Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-207

APPALACHIAN POWER COMPANY,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF THE STATE OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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August 8, 1975

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Statute Involved	5
Question Presented	5
Statement	5
The Question is Substantial	10
Conclusion	17
Appendix:	
Supreme Court of Appeals of West Virginia—Order Entered May 12, 1975	1a
Supreme Court of Appeals of West Virginia—Order Entered June 9, 1975	3a
Public Service Commission of West Virginia—Order Dated March 6, 1975	4a
Public Service Commission of West Virginia—Order Dated March 26, 1975	7a
Notice of Appeal to the Supreme Court of the United States—Filed in the Supreme Court of Appeals of West Virginia	10a
Notice of Appeal to the Supreme Court of the United States—Filed in the Public Service Commission of West Virginia	11a

TABLE OF AUTHORITIES

Cases:

Andrews v. *Virginian Ry. Co.*, 248 U.S. 272 (1918) 4

Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission, 346 U.S. 346 (1953)....3, 4, 11

Bluefield Water Works & Improvement Co.* v. *Public Service Commission of the State of West Virginia, 262 U.S. 679 (1923) 3, 11, 12

PAGE

Grand Trunk Western Ry. Co. v. *Railroad Commission of Indiana*, 221 U.S. 400 (1911) 4, 11, 13

Greene v. *McElroy*, 360 U.S. 474 (1959) 17

Interstate Commerce Commission v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913) 16

Lake Erie and Western R.R. Co. v. *State Public Utilities Commission of Illinois*, 249 U.S. 422 (1919) 3, 11, 12

Londoner v. *Denver*, 210 U.S. 373 (1908) 11

Morgan v. *United States*, 304 U.S. 1 (1938) 16

Morgan v. *United States*, 298 U.S. 468 (1936) 10

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967) 4

Ohio Bell Telephone Co. v. *Public Utilites Commission of Ohio*, 301 U.S. 292 (1937) 10, 13

Prentis v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908) 4

United States v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924) 15

West Ohio Gas Co. v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63 (1935) 14

Wheeling Steel Corporation v. *Public Service Commission*, 90 W. Va. 74, 110 S.E. 489 (1922) 10

Statutes:

United States Constitution, Fourteenth Amendment 5, 9, 10

Title 28, United States Code, Section 1257(2) 1, 3, 4, 11, 12

West Virginia Code

Chapter 24, Article 5, Section 1 ..... 2, 4, 9

Chapter 24, Article 2, Section 2 3

Chapter 24, Article 2, Section 7 3

Chapter 24, Article 3, Section 1 3

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JURISDICTIONAL STATEMENT

Appalachian Power Company ("Appellant", "Appalachian" or the "Company") appeals from an order of the Supreme Court of Appeals of West Virginia, entered on May 12, 1975, upholding an order of the Public Service Commission of West Virginia (the "Commission") and submits this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

In the event that the order of the Supreme Court of Appeals is not construed as a judgment by the highest court of the state in which a decision could be had within the meaning of 28 U.S.C. 1257(2), Appalachian respectfully requests that the Court treat this as an appeal directly from the Commission (see p. 4, *infra*). The reason for this

alternative approach is apparent upon a reading of the Supreme Court of Appeals' order of May 12, 1975 (App., p. 1a). That order does not make it clear whether the court rejected the Company's petition for review and affirmed the Commission's order on the merits or whether the court merely declined to exercise its appellate jurisdiction.

Opinion Below

The order of the Supreme Court of Appeals of West Virginia entered May 12, 1975 is not reported and that court issued no opinion. The order of the Supreme Court of Appeals of West Virginia entered June 9, 1975 denying Appalachian's supplemental petition is not reported and that court issued no opinion. The Orders of the Commission dated March 6, 1975 and March 26, 1975 are not reported. Copies of each order are included in the Appendix at pp. 1a, 3a, 4a and 7a, respectively.

Jurisdiction

This suit was taken directly from the Commission to the Supreme Court of Appeals of West Virginia (the highest court in the state) pursuant to the provisions of the West Virginia Code, Chapter 24, Article 5, Section 1,* to review orders of the Commission requiring Appalachian to cease and desist from certain service practices and to refund charges paid by customers for "such unapproved practices." Although the Commission did not cite specific statu-

* This Section provides the only means for judicial review in the West Virginia courts of an order of the Commission and states in relevant part:

> "Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals . . . within thirty days after the entry of such order, praying for the suspension of such final order . . . The court or judge shall fix a time for the hearing on the application . . . after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right."

tory authority for its order, the Commission did, in a subsequent statement of its reasons for the entry of its orders filed with the Supreme Court of Appeals of West Virginia, cite as statutory authority Chapter 24, Article 2, Sections 2 and 7, and Chapter 24, Article 3, Section 1 of the West Virginia Code, which grant the Commission general regulatory power over utilities.

The order of the Commission was issued on March 6, 1975; the petition for rehearing before the Commission was denied by order issued March 26, 1975; and the petition and supplemental petition for suspension, appeal and review of the said orders were filed in the Supreme Court of Appeals of West Virginia on April 4, 1975 and April 18, 1975, respectively. The order of the Supreme Court of Appeals denying Appalachian's petitions was entered on May 12, 1975. Appalachian filed a supplemental petition based upon new information with that court on June 2, 1975, which petition was denied by order entered June 9, 1975. A notice of appeal was filed with the clerk of the Supreme Court of Appeals of West Virginia on August 5, 1975, a copy of which is included in the Appendix at p. 10a. Subsequently, on August 8, 1975 a notice of appeal was filed with the Public Service Commission of West Virginia, a copy of which is included in the Appendix at p. 11a.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case, because the Commission's Order of March 6, 1975 is deemed to be a state "statute" within 28 U.S.C. 1257(2). *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission,* 346 U.S. 346 (1953); *Bluefield Water Works & Improvements Co.* v. *Public Service Commission of the State of West Virginia,* 262 U.S. 679 (1923); *Lake Erie and Western*

R.R. Co. v. *State Public Utilities Commission of Illinois,* 249 U.S. 422 (1919); *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana,* 221 U.S. 400 (1911).

The orders of May 12 and June 9, 1975 of the West Virginia Supreme Court of Appeals were final orders of the highest court in the state upholding the validity of the state "statute"—the Commission's order of March 6, 1975. *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission, supra.**

Should, however, the orders of the West Virginia Supreme Court of Appeals not be construed as a judgment by the highest court of the state in which a decision could be had within the meaning of 28 U.S.C. 1257(2), the Company offers in the alternative an appeal from the orders of the Public Service Commission of West Virginia. In that event Appalachian submits that the Commission, by its order of March 26, 1975, denying Appalachian's petition for rehearing, was a "court" within the meaning of 28 U.S.C. 1257(2), and that its decision in favor of the validity of the Commission's order of March 6, 1975, was, therefore, a final judgment rendered by the highest court of the State in which a decision could be had.** See *Prentis* v. *Atlantic Coast Line Co.,* 211 U.S. 210, 224 (1908).

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* The Court has reviewed a *per curiam* denial by a Florida district court of an application for a writ of certoriari to review the determination of the Florida Industrial Commission Unemployment Compensation Board of Review which denial was found to preclude further state review. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967).

** This position is not inconsistent with the position that the 90-day period within which to seek review commenced on May 12, 1975, the date of the entry of the order of the Supreme Court of Appeals. That appeal was taken as of right under West Virginia Code, Chapter 24, Article 5, Section 1 and clearly could have resulted in an order affecting the rights of the parties as those rights were set forth by the Commission in its orders of March 6, 1975 and March 26, 1975. See *Andrews* v. *Virginian Ry. Co.,* 248 U.S. 272 (1918).

Statute Involved

The statute involved, as that term has been defined by this Court, is the cease and desist order issued on March 6, 1975 by the Public Service Commission of West Virginia in Case No. 8155.

Question Presented

Where Appalachian, pursuant to an approved tariff, initiated on October 1, 1974 the practice of charging for certain service extensions, is an Order of the Commission directing Appalachian to cease and desist from imposing charges for these service extensions and directing Appalachian to refund to its customers such charges collected since October 1, 1974, consistent with the procedural due process requirements of the Fourteenth Amendment of the United States Constitution, where that Order was promulgated without affording Appalachian notice or opportunity to be heard and where that Order was issued in the absence of any evidentiary presentation?

Statement

Appellant, hereinafter referred to as Appalachian, is a wholly-owned subsidiary of the American Electric Power Company, Inc., engaged in the production, transmission and distribution of electric energy in West Virginia and Virginia. The rates which Appalachian charges its customers situated in West Virginia, and the terms and conditions of service affecting those customers, are regulated by the West Virginia Public Service Commission under the provisions of the West Virginia Code, Chapter 24, and the Rules of Practice and Procedure of the Commission.

For some years prior to October 1, 1974, Appalachian followed the practice of providing at its own expense the

"service entrance cable" for new residential customers installing a service entrance switch with a capacity of 100 amperes or more. A "service entrance cable" refers to the electrical cable which runs from the customer's meter to the top of the customer's dwelling, where it is then connected to Appalachian's aerial service cable extending from the distribution pole to the dwelling. New residential customers installing a service entrance switch with a capacity less than 100 amperes, as well as all other classes of customers, have always been required to provide at their own expense this cable or an equivalent entrance conductor.

The Terms and Conditions of Service contained in Appalachian's Tariff on file with the Commission prior and subsequent to October 1, 1974 provide:

> "Where customers install service entrance facilities which have capacity and layout specified by the company and/or install and use certain utilization equipment specified by the company, the company *may provide* or offer to own certain facilities on the customer's side of the point where the service wires attach to the building." (Emphasis supplied.)

Thus, by its terms, the tariff approved by the West Virginia Public Service Commission permitted Appalachian to provide the service entrance cable at its own expense or to charge the customer for such expense.

Effective October 1, 1974, Appalachian changed its practice by requiring *all* customers to install at their own expense the service entrance cable. At the time Appalachian changed its practice, Appalachian did so in the belief that the permissive language contained in the above-quoted tariff provision allowed Appalachian to make the change without any further approval from the Commission. That is, once the Commission had approved that tariff provision, the tariff by its own terms permitted Appalachian to choose whether or not it would continue to provide at

its own expense the service entrance cable. Therefore, no change in the applicable tariff provision governing service entrance facilities was made at the time the Company's policy changed. By its order of March 6, 1975, the Commission, in effect, retroactively changed the permissive character of the tariff to mandate that the Company provide the service entrance cable at its own expense.

The Commission, on March 7, 1975, during continued hearings concerning an entirely separate proceeding (Commission Case No. 7083, Appalachian's request for an increase in electric rates) by Chairman Smith (with Commissioner Gibson present) opened a new proceeding (Case No. 8155) regarding an investigation of Appalachian's service practices. The record in the newly-opened proceeding consisted of 35 pages of transcript and one exhibit. At the beginning of the "hearing" Chairman Smith called the attorneys for Appalachian to the bench and presented an order which required Appalachian to "cease and desist from the practices and charges it began to make on or after October 1, 1974" and to "forthwith refund any . . . charges already paid by its customers for such unapproved practices since October 1, 1974." After having given the parties a chance to read the order, the Chairman referred to various complaints which presumably served as a basis for the cease and desist order. None of the alleged complaints was made available to Appalachian before the hearing (Transcript of hearing of March 7, 1975 in Case No. 8155 before the Public Service Commission of West Virginia, pp. 3-7, hereinafter "Tr. ").

The Chairman directed the Secretary of the Commission to provide Appalachian with a list of complainants so that the Company could satisfy the complaints and report to the Commission. He noted that where Appalachian felt the complaints were inappropriate "we can set that down for formal hearing on those particular individual cases" (Tr. 10).

The Chairman, after having provided the background information for the order, stated that the Commission would be glad to take any questions or statements before passing on to Case No. 7083, the rate proceeding (Tr. 10-11).

Appalachian's counsel, Charles R. McElwee, Esq., said that it was Appalachian's understanding that the hearing was called in order to allow the Company to respond to a Commission question concerning a wholly different service matter. The Chairman stated that since the date the hearing was set, the Commission had discovered the problem dealt with in its cease and desist order (Tr. 12-13).

Mr. Vaughan, the Executive Vice President of Appalachian, then testified with respect to the service matter for which the hearing was called (Tr. 14-21). After Mr. Vaughan's testimony, Mr. McElwee asked the Chairman for time to analyze and respond to the cease and desist order (Tr. 23-25). The Chairman stated:

> "You are free to take as little or as much time as you want to on that, just so long as you abide by the order" (Tr. 25).

Commissioner Gibson then questioned Mr. Vaughan on the service matter dealt with in the cease and desist order, a matter to which Mr. Vaughan noted he was not prepared to respond, although he did so to the best of his ability (Tr. 28-30).

It is plain from the transcript that the Commission had given little consideration to its action. For example, Chairman Smith's first question to Mr. Vaughan, was as follows:

> "Would you explain again your policy before October 1, 1974, with regard to the 'service entrance cable' which I understand runs from the meter base up to what point?" (Tr. 30).

The fact that the order was dated March 6, 1975, one day before the "hearing" during which the Company became aware of it, is indicative of the nature of the Commission proceeding. It is also noteworthy that the witness who testified came prepared, at the Commission's request, to present evidence on another matter. Finally, the Chairman's questions indicated that even the Commission had not given thorough consideration to its action.

On March 14, 1975, Appalachian filed with the Commission a petition for rehearing, reconsideration, reargument, rescission, revocation and modification. This petition stated as the first ground for Appalachian's action that the "Commission's order of March 6, 1975, was entered without notice to or opportunity to be heard by Appalachian in violation of the due process clause[s] of the Fourteenth Amendment to the Federal Constitution . . ." On March 26, 1975 by its denial of Appalachian's petition of March 14, 1975 without opinion the Commission rejected Appalachian's constitutional objection.

The same constitutional objection was raised in Appalachian's petition for suspension, appeal and review of the Commission orders filed with the Supreme Court of Appeals of West Virginia on April 4, 1975. The petition stated that the "Commission's order of March 6, 1975 was entered without notice to, or opportunity to be heard by, Appalachian in violation of the due process of clause[s] of the Fourteenth Amendment to the Federal Constitution . . ." The appeal to the Supreme Court of Appeals of West Virginia was brought pursuant to the West Virginia Code, Chapter 24, Article 5, Section 1. Oral argument was had before the court on April 22, 1975. On May 12, 1975, by denying the relief sought in Appalachian's petition (one justice dissenting) the Supreme Court of Appeals rejected Appalachian's constitutional objection.

A supplemental petition seeking clarification of the Commission's intentions with respect to refunds to customers charged for service entrance cables after October 1, 1974 was filed with the Supreme Court of Appeals on June 2, 1975. The aforesaid constitutional objection was repeated in that petition, wherein the Company referred to its April 4 petition and stated "that the Commission's cease and desist and refund order of March 6 is void because it was entered without notice to, or opportunity to be heard by, Appalachian in violation of the state and federal constitutions . . ." The court denied such petition by order dated June 9, 1975.

The Question Is Substantial

Preliminary Statement

As an elementary proposition, the Fourteenth Amendment requires that at some time before one is finally deprived of his property, he must be accorded due process of law. This case deals with procedural due process, that is, the right to notice and opportunity to be heard on matters affecting one's vested rights. It has long been settled that an administrative proceeding of a quasi-judicial character carries with it the fundamental procedural requirement of a full hearing in which evidence is received and weighed by the trier of facts. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292, 304-5 (1937) and cases cited therein; *Morgan* v. *United States,* 298 U.S. 468, 480 (1936).

Without providing notice to or meaningful opportunity to be heard by Appalachian, the West Virginia Public Service Commission ordered Appalachian to cease and desist certain practices and to refund monies collected as a result of those practices.* Appalachian merely seeks the opportunity to present its case to the Commission, demonstrating the impact of the order and detailing the reasons why it believes the order is improper. The Court has found that:

> "A hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908).

Appalachian believes that the procedure followed by the Commission and the West Virginia Supreme Court of Appeals in this case has denied it the basic right to a hearing and may set a dangerous precedent for similar actions in the future. Although administrative powers may be far-reaching and judicial review may be limited, the Constitution of the United States guarantees to both individuals and corporations certain fundamental rights. Procedural due process has been the mainstay of those rights. The resolution of this issue in this case transcends state boundary lines and is vital to the protection of virtually every business in the country subject to administrative regulation.

Review by Direct Appeal

The cases supporting the Company's position that this appeal may be brought directly under 28 U.S.C. § 1257(2) are *Atchison Topeka & Santa Fe Ry. Co.* v. *California Public Utilities Commission,* 346 U.S. 346 (1953), *Bluefield Water Works & Improvements Co.* v. *West Virginia Public Service Commission,* 262 U.S. 679 (1923), *Lake Erie and Western R.R. Co.* v. *State Public Utilities Commission of Illinois,* 249 U.S. 422 (1919), and *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana,* 221 U.S. 400 (1911).

In the *Atchison* case, the California Commission issued orders requiring installation of grade separations at cer-

* The Supreme Court of Appeals of West Virginia has held that the jurisdiction of the Commission is limited to prescribing rates and practices to be applied in the *future* and that it has no jurisdiction to award reparations for past injuries. *Wheeling Steel Corporation* v. *Public Service Commission,* 90 W. Va. 74, 110 S.E. 489 (1922).

tain railroad crossings and allocating part of their cost to the appellant under provisions of the California Code. On petitions to the Supreme Court of California that court denied review of the Commission orders. On appeal, this Court said:

> "We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2)." 346 U.S. at 348.

The Court noted that the appellants had presented squarely to the Supreme Court of California their contention that in the allocation of costs, the orders had taken appellant's property without due process of law and that in sustaining the Commission's orders by denying writs of review, the Supreme Court of California had upheld the statute as applied by the Commission, and the case was therefore properly before the Supreme Court of the United States on appeal.

In the *Lake Erie* case, the Court held that an order by the Illinois Commission, requiring the appellant to maintain a certain railway siding "being legislative in its nature, and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction." 249 U.S. at 424.

In the *Bluefield* case, the Court decided that the validity of an order prescribing rates may be reviewed on direct appeal. Said the Court:

> "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error* and

* The writ of error is the forerunner of the current direct appeal provided for in 28 U.S.C. § 1257(2).

> to have that question decided by this Court. 262 U.S. at 683.

In the *Grand Trunk* case, the Indiana Commission ordered the installation of an interlocking safety device at the intersection of two railroads and allocated the costs in a manner contrary to the provisions of a prior contract between the two roads. The case reached the Court pursuant to a writ of error. The Court observed that the order "is a legislative act by an instrumentality of the State exercising delegated authority . . . and is of the same force as if made by the legislature . . ." 221 U.S. at 403. The Court proceeded to decide the constitutional issues involved.

While commission action may be deemed "legislative" for purposes of determining Supreme Court jurisdiction, Appalachian believes that that same action may be considered "quasi-judicial" in nature in assessing the order's impact upon the appellant for purposes of determining whether due process must be accorded appellant. In fact, this proposition is subsumed in *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio,* 301 U.S. 292 (1937) considered below.

Discussion

The issue involved in this case is rather simple and has been considered on several occasions by the Supreme Court.

In *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio, supra,* the Court reviewed on direct appeal an Ohio Public Utilities Commission decision ordering refunds as a result of a determination of property values based upon the strength of information secretly collected and not disclosed to the company. The company protested and asked for disclosure of the evidence and the opportunity to

analyze and rebut it. The Commission refused and, upon the strength of the unknown documents, ordered millions of dollars of refunds, reporting its conclusions, but not the underlying proofs.

The Court held that:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record. * * * This is not the fair hearing essential to due process. It is condemnation without trial." 301 U.S. at 300.

The Court questioned how it was possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable. 301 U.S. at 303.

It was emphasized that because regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law "[a]ll the more insistent is the need . . . that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity." 301 U.S. at 304.

The Court also said:

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 305.

To the same effect is *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio (No. 1)*, 294 U.S. 63 (1935). In that case, on the eve of a final rate determination, the Ohio Commission, by *ex parte* order, directed that certain annual reports of the company be introduced into evidence and

made a part of the record. On the basis of these reports, the Commission determined what it felt would be a proper amount of expenses to be allocated to the rates charged in one community. The Court found:

> ". . . the weakness of the case for the appellee [Commission] is that the fundamentals of a fair hearing were not conceded to the company. Opportunity did not exist to supplement or explain the annual reports as to the distribution of the expenses in the neighboring communities, nor did opportunity exist to bring the rates outside of Lima into harmony with the exigencies of a new method of allocation adopted without warning." 294 U.S. at 70.

The Court held that division on one basis in one community and on another basis in a different community, all without notice to the company that the spread was to be altered and the new evidence received, "was an exercise of arbitrary power, at variance with 'the rudiments of fair play' . . . long known to our law. The Fourteenth Amendment condemns such methods and defeats them." 294 U.S. at 71.

A similar decision was reached in *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274 (1924), where the Court struck down an ICC order relating to division of interstate joint rates. The Commission considered without placing into evidence certain annual reports filed with it by plaintiff carriers. The Court found that the Commision was under an obligation to introduce by specific reference such parts of the reports it wished to treat as evidence. The Court, noting that the objection to the use of the data contained in the reports was not lack of authenticity or untrustworthiness, stated:

> "It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The

requirement that in an adversary proceeding specific reference be made is essential to the preservation of the substantial rights of the parties." 265 U.S. at 289.

In the second *Morgan* case, *Morgan* v. *United States,* 304 U.S. 1 (1938), the Court held constitutionally defective the administrative procedure followed by the Secretary of Agriculture in fixing certain rates because the persons to be affected by the order were found not to have been adequately apprised of what the Secretary proposed to do prior to the time he actually did it. Said the Court:

> "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." 304 U.S. at 18-19.

Moreover, the Court has stricken down arguments that administrative findings in the absence of supporting evidence are presumed to have been supported by information available to the agency and cannot be set aside where the agency after a hearing merely states that, in its opinion, the rates were unreasonable. *Interstate Commerce Commission* v. *Louisville & Nashville R.R. Co.,* 227 U.S. 88 (1913). The Court found that such a construction would nullify the right to a hearing—

> "for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." 227 U.S. at 93.

The Court went on to say:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding." 227 U.S. at 93-94.

The Court has spoken of certain principles which have remained "relatively immutable in our jurisprudence." Chief Justice Warren, speaking for the Court, said "This Court has been zealous to protect these rights from erosion . . . not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy,* 360 U.S. 474, 496-7 (1959).

The Court noted that one of these immutable principles is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* at 496.

Conclusion

The gravity of the claim in this case is apparent. It involves traditional concepts of constitutional law and the

necessary safeguards for fair and open administrative procedures. The matter is of great public importance and requires plenary consideration by the Court.

Respectfully submitted,

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August 8, 1975

APPENDIX

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of May, 1975, the following order was made and entered, to-wit:

(P.S.C. Case No 8155)

APPALACHIAN POWER COMPANY, a corporation

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

Upon an appeal from, suspension and review of the final orders of the Public Service Commission of West Virginia made and entered on the 6th day of March and the 26th day of March, 1975.

The Court, having maturely considered the petition and exhibits, note of argument in support thereof; supplemental petition and note of argument in support thereof; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final orders complained of; the statement of reasons for the entry of its orders of the 6th and 26th days of March, 1975, filed herein by the respondent, Public Service Commission of West Virginia, on April 22, 1975; and the oral argument of counsel on the 22d day of April, 1975, the date fixed by the Court for hearing upon the aforesaid petition and supplemental petition; a majority of the Court is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in

this proceeding, be, and the same is hereby denied. Justice Caplan would grant. Justice Berry, deeming himself disqualified, did not participate.

It is further ordered that leave be, and the same is hereby granted to the Public Service Commission of West Virginia to withdraw from the office of the Clerk of this Court, the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia.

A True Copy

Attest: GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of June, 1975, the following order was made and entered, to-wit:

P.S.C Case No. 8155

APPALACHIAN POWER COMPANY, a corporation

vs.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

On a former day to-wit, June 2, 1975, came the petitioner, Appalachian Power Company, a corporation, by James, Wise, Robinson & Magnuson and Charles R. McElwee, its attorneys, and presented to the Court its supplemental petition praying for an appeal from, suspension and review of the final orders of the Public Service Commission of West Virginia made and entered on the 6th and 26th days of March, 1975, in Case No. 8155, which being seen and inspected by the Court the supplemental petition aforesaid is refused. Justice Berry deeming himself disqualified, did not participate.

A True Copy

Attest: GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 6th day of March, 1975.

Case No. 8155

APPALACHIAN POWER COMPANY, a corporation.

Investigation of service practices and charges.
Proceeding on motion of the Commission.

WHEREAS, between the dates of February 11, 1975, and the date of this order, the Commission has received more than 85 complaints that Appalachian Power Company, a corporation, (Appalachian) has and is requiring all of its customers, including residential, commercial and industrial customers, to pay all costs in connection with rendering new, changed or additional service in advance of construction as a non-refundable contribution in the amount of the investment required to construct, install or change the facilities of Appalachian to render such service; and

WHEREAS, pursuant to (a) Rules 29 and 30 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) Appalachian's effective tariffs on file with this Commission; and (c) Appalachian's practices and charges or lack of charges prior to October 1, 1974, all or a substantial part of said construction, installation or change on Appalachian's side of the customer's service outlet or meter base, back to Appalachian's distribution or transmission line, are to be paid for and have previously been paid for by Appalachian; and

WHEREAS, by letter dated February 6, 1975, addressed to "West Virginia Public Service Commission" Appalachian through John W. Vaughan, its Executive Vice President, advised that Appalachian was putting into effect on February 10, 1975, certain practices purporting to relate to extensions and expansions of service and purporting to be implemented pursuant to Section "Extension of Service" of Appalachian's tariff, Original Sheet No. 4 of P.S.C. W. Va. No. 2, and this change in practices and charges was due to a "serious erosion of its earnings"; and

WHEREAS, Appalachian sought to impose upon its customers a written form of agreement whereby the customer seeking electric service was to be forced to pay all the cost of providing electric facilities in an amount to be set by Appalachian and which purported to be "under the Company's standard Terms and Conditions of Service as regularly filed with the Public Service Commission of West Virginia," but which is not so provided therein; and

WHEREAS, the Commission infers from these representations by Appalachian and its officers and those reportedly made by its employees and agents that the purpose of this new policy of service practices and charges was made to bring pressure on the Commission to accede to the rate requests of Appalachian, and that these allegations, if true, would constitute a violation of Appalachian's duty as a public utility; and

WHEREAS, unilaterally and without the prior consent of this Commission, Appalachian has changed its policy of service and charges to all its customers and has not filed with the Commission an application or tariff changes for approval of such service charges, as required by law.

IT IS, THEREFORE, ORDERED that Appalachian Power Company cease and desist from the practices and charges it began to make on or after October 1, 1974, which are not provided for (a) in Rule 29 of the Commission's Rules and Regulations for the Government of Electric Utilities; (b) the effective tariff sheets of Appalachian Power Company; or (c) which were not its actual practice and charges for construction, installation or change prior to October 1, 1974.

IT IS FURTHER ORDERED that Appalachian Power Company shall forthwith refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974.

IT IS FURTHER ORDERED that the Secretary of this Commission give Appalachian Power Company a list of the names and addresses of the many complainants who have made or will make formal or informal complaints with this Commission from February 10, 1975, until further order of the Commission, and that Appalachian Power Company file its written report every Monday, beginning Monday, March 10, 1975, until further order of this Commission, which report shall advise the Commission whether and how it has satisfied the said complainants who are or will be listed to Appalachian Power Company by this Commission.

Teste:

S. GROVER SMITH, JR.,
Secretary

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 26th day of March, 1975.

CASE NO. 8155

APPALACHIAN POWER COMPANY, a corporation.

Investigation of service practices and charges.
Proceeding on motion of the Commission.

ORDER DENYING PETITION FOR REHEARING, RECONSIDERATION, REARGUMENT, RESCISSION, REVOCATION AND MODIFICATION FILED ON BEHALF OF APPALACHIAN POWER COMPANY

On March 14, 1975, Appalachian Power Company filed its "Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification" of the order of the Commission issued on March 6, 1975, in which Appalachian Power Company was ordered to cease and desist from violating the law as to certain practices and charges which were unilaterally changed from that existing prior to October 1, 1974, without the prior approval of the Commission. The cease and desist order also required Appalachian to refund any of such charges already paid by its customers for such unapproved practices since October 1, 1974, and ordered weekly reporting of the compliance of Appalachian Power Company with its said order issued March 6, 1975.

The said Petition for hearing alleges that (1) our order was issued without notice or opportunity to be heard by

Appalachian, (2) without statutory authority, and (3) without findings based on evidence.

These grounds are rejected as a matter of law, because Appalachian Power Company has admitted that it changed its practices in effect before October 1, 1974, without the prior approval of this Commission as required by law under pertinent governing statutes, rules, and regulations. Under Code 24-2-2, the Commission is given the broad power to require public utilities to conform to the laws of West Virginia and to all rules, regulations and orders of the Commission.

In addition, in its Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification, Appalachian Power Company denied that its employees or agents made any representations from which the Commission could infer that Appalachian was unilaterally changing its practices and charges so as to bring pressure on the Commission to accede to the rate requests of the utility. However, at the oral argument on Appalachian's petitions for rehearing in its contemporaneous general rate case, No. 7083, Appalachian made the argument that rate relief was needed to permit it to perform its public utility obligations; that is, to make transformer, line, and other installations necessary to serve new customers or the increased power needs of existing customers. This alone supports the inferences which the Commission received from the representations of employees and agents of Appalachian, regardless of equally specific data contained in the more than 85 complaints received by the Commission and referred to in the Commission's cease and desist order.

The record made in this case supports the order of March 6, 1975, in defining the practices and charges existing prior to October 1, 1974, which Appalachian improperly changed

and which are specifically within the knowledge of Appalachian.

The other allegations in the petition for rehearing herein are likewise without basis in law and fact and are hereby rejected.

ORDER

The Commission hereby affirms its cease and desist order issued herein on March 6, 1975, and denies the Petition for Rehearing, Reconsideration, Reargument, Rescission, Revocation and Modification filed on March 14, 1975, on behalf of Appalachian Power Company.

Teste:

S. Grover Smith, Jr.,
Secretary

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

(P.S.C. Case No. 8155)

APPALACHIAN POWER COMPANY, a corporation
Appellant,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant in the above-captioned proceeding, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of the State of West Virginia, entered in this action on May 12, 1975, affirming orders of the Public Service Commission of West Virginia issued on March 6, 1975 and March 26, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 5, 1975.

CHARLES R. MCELWEE
Counsel for Appalachian Power Company,
Appellant

FILED
AUG. 5, 1975
GEORGE W. SINGLETON
Clerk of the Supreme Court of Appeals of West Virginia

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

CHARLESTON

(P.S.C. Case No. 8155)

APPALACHIAN POWER COMPANY, a corporation,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appalachian Power Company, the appellant in the above-captioned proceeding, hereby appeals to the Supreme Court of the United States from the final orders of the Public Service Commission of West Virginia, entered in this action on March 6, 1975 and March 26, 1975, review of said orders having been denied by the Supreme Court of Appeals of West Virginia by its orders of May 12, 1975, and June 9, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: August 7, 1975.

CHARLES R. MCELWEE
Counsel for Appalachian Power Company,
Appellant

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